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No. 82-675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,
Respondent,

KAISER CEMENT CORPORATION, *et al.*,
Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page(s)
I. THIS PETITION RAISES AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT	1
A. Judge Muecke's Recusal Was Based Solely On Statutory Interpretation Applicable to All Federal Judges and Not On Any Personal Ethical Consideration	1
B. The Problems of Judicial Administration Raised By the Ninth Circuit's Ruling Merit Review of the Issue By This Court	3
II. THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND THE PRACTICE IN ALL FEDERAL COURTS, AND THERE IS NO CLEAR CONGRESSIONAL MANDATE WHICH RESOLVES THE DISPUTE	4
III. CONCLUSION	8

TABLE OF AUTHORITIES

CASES	PAGE(S)
Georgia-Pacific Corp. v. Lyman Lamb Co., No. 81-1619	7
Hampton v. City of Chicago, 643 F.2d 478 (7th Cir. 1981)	3
In re Cement and Concrete Antitrust Litigation, 515 F. Supp. 1076 (D. Ariz. 1981)	*passim*
In re Cement Antitrust Litigation (MDL 296), 673 F.2d 1020 (9th Cir. 1982), *petition for cert. pending* No. 82-287	4
*In re Cement Antitrust Litigation (*MDL 296), 688 F.2d 1297 (9th Cir. 1982)	*passim*
In re Plywood Antitrust Litigation, 655 F.2d 627 (5th Cir. 1981)	7
Illinois Brick Company v. State of Illinois, 431 U.S. 720 (1977)	3
United States v. Will, 499 U.S. 200 (1980)	7
Weyerhaeuser v. Lyman Lamb Co., No. 81-1618	7
STATUTES AND RULES	
Rule 23, Federal Rules of Civil Procedure	6
Rules of the United States Supreme Court,	
Rule 21	7
Rule 28.1	7
Title 28 U.S.C. §455	*passim*
OTHER AUTHORITIES	
Canon 3C, Code of Judicial Conduct	2, 5
Judicial Disqualification: Hearings on S.1064 Before Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess (1971, 1973)	6

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REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THIS PETITION RAISES AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT

A. Judge Muecke's Recusal Was Based Solely On Statutory Interpretation Applicable to All Federal Judges and Not On Any Personal Ethical Consideration

Although this petition presents a specific, limited issue of statutory construction, the real parties in interest argue that petitioners are seeking review of the district court's exercise of

its judicial discretion. The "Brief in Opposition To Petition for Writ of Certiorari" (hereinafter "Opposition Brief"), at page 5, erroneously asserts that Judge Muecke recused himself because, "'[r]egardless of the applicability of § 455, . . . [he was] very persuaded by the Advisory Committee's conclusions as to Canon 3C [of the Code of Judicial Conduct,' . . ." Accordingly, the real parties in interest argue that a writ of certiorari should not issue since, "[e]ven in the unlikely event that this Court were to conclude that the Ninth Circuit and Judge Muecke were wrong on the issues relating to Section 455, that would not support an order requiring Judge Muecke to sit in the face of his ethical conclusions. . . ." This assertion distorts the record. In fact, Judge Muecke held that he was not precluded by any ethical consideration from continuing to preside.

Real parties in interest quote only a portion of Judge Muecke's statements regarding the persuasiveness of the Advisory Committee's letter on the subject of Canon 3C. The full text of this section of his decision demonstrates that Judge Muecke was making general observations about ethical considerations and not ruling on their relevance to this case:

> Regardless of the applicability of § 455, this Court is very persuaded by the Advisory Committee's conclusions as to Canon 3C. Section 455 outlines the *legal* boundaries of when a judge must recuse himself. Canon 3C defines the ethical boundaries. Even if I could legally proceed with a case, I would refuse to do so *if I were to determine that it was ethically improper.*

(*In re Cement and Concrete Antitrust Litigation*, 515 F.Supp. 1076, 1079 (D. Ariz. 1981); first emphasis in original, second emphasis added.)

Rather, in a different portion of his opinion (at pages 1080-1081) Judge Muecke extensively considered all relevant facts, and concluded that no appearance of impropriety is created by his wife's stockholdings. Moreover, he succinctly rejected the appearance of impropriety as the basis of his recusal at page 1078:

> I have concluded that I must recuse myself not because I feel a sense of conflict, and *not because I feel that to*

continue would create the appearance of impropriety. I have concluded that I must recuse myself for the sole reason that the law, as written, says I must.

(Emphasis added.) Both Judge Muecke's and the Ninth Circuit's rulings raise a pure question of federal law for which review by this Court is appropriate—*i.e.*, is a class member a party under 28 U.S.C. §455(b)(4).[1]

B. The Problems of Judicial Administration Raised By the Ninth Circuit's Ruling Merit Review of the Issue By This Court.

The real parties in interest go to great lengths to minimize the problems of judicial administration caused by application of the *per se* recusal rule to interests in class members.[2] The Opposition Brief (at page 17) implies that since this is the only case of recusal for stock ownership in a class member in the eight years since the amendment of Section 455, it is unlikely to happen again. The short answer is that the federal judiciary and bar, like Congress, never considered the possibility that interests in class members might require *per se* recusal before the real parties in interest raised it here.

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[1] The argument (Opposition Brief at 19-21) that the Ninth Circuit erred in its interpretation of this Court's decisions regarding the propriety of writs of mandamus is not a reason to deny the writ of certiorari here. The question whether mandamus would have been an appropriate remedy had the Ninth Circuit concluded that Judge Muecke was in error has not been raised by a petition for a writ of certiorari. However, insofar as the real parties in interest have suggested this issue, it would appear to be based on a conflict between circuits (compare the Ninth Circuit opinion, Appendix A to the petition, with *Hampton v. City of Chicago*, 643 F.2d 478 (7th Cir. 1981)). Therefore, if anything, real parties in interest have actually advanced an additional reason for granting a writ of certiorari.

[2] Strangest among these is the suggestion (Opposition Brief at 13) that Judge Muecke's recusal is simply a result of "the logistical problems created by massive, ambiguously defined class actions where classes are repeatedly restructured for plaintiffs' convenience." As the real parties in interest are well aware, there is nothing ambiguous about the class definition which includes purchases of cement (for delivery in the United States) between 1968 and 1976. Moreover, the change from the class definition plead in the complaints was a result of this court's intervening decision in *Illinois Brick Company v. State of Illinois*, 431 U.S. 720 (1977).

It is highly probable that (like the class action judges before him) Judge Muecke would have finished the *Cement* litigation without ever looking at the class list and discovering Mrs. Muecke's interests had they not been brought to his attention by the real parties in interest. But Pandora's Box has been opened, and it is naive to hope that the next eight years will pass without similar challenges being made. It may well be that judging interests in class members under the "other interest" substantiality standard will not solve all of the administrative problems noted in the petition. However, it will result in less disruption, fewer mid-litigation reassignments,[3] and less burden on an already over-worked judiciary.

II.

THERE IS A CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND THE PRACTICE IN ALL FEDERAL COURTS, AND THERE IS NO CLEAR CONGRESSIONAL MANDATE WHICH RESOLVES THE DISPUTE

The real parties in interest assert that there is no conflict among the circuits regarding a class member's status as a party under Section 455(b)(4). Since there is no dispute that only one circuit court has ever addressed this issue, there cannot be any "conflicting decisions" in the usual sense of the term. Nevertheless, there is a definite conflict between the Ninth Circuit's ruling and the practice of all federal courts regarding the evaluation of interests in class members for disqualification

[3] Contrary to the assertion at page 17 of the Opposition Brief, the Ninth Circuit has never "explicitly found that the [Judicial] Panel can act" here to assign a new judge. Two members of the Ninth Circuit panel which declined to accept the Section 1292(b) petition and dismissed the Section 1291 appeal "opine[d]" in *dicta* that the Judicial Panel's stock ownership would not affect its ability to transfer the litigation. *In re Cement Antitrust Litigation, (MDL 296)*, 673 F.2d 1020, 1024-25 (9th Cir. 1982), *petition for cert. pending*, No. 82-287. The third member of that panel, however, strenuously disagreed and noted that the majority's statements in this regard represented the judges' "thinking," not a finding or ruling. (*Id.* at 1031.) Neither petitioners nor the real parties in interest can have any idea of the basis for the Judicial Panel's declining to assign a new judge. (*See*, Appendix H to the petition in No. 82-287.) At that time, the Panel had knowledge both that the Ninth Circuit was considering the mandamus petition and that five of its seven members had holdings in entities on the Master Class List.

purposes, which conflict merits resolution by this Court. The Opposition Brief (at pages 7 and 14) attempts to refute this conflict by citing those federal court rules which require the disclosure of entities with interests in the outcome of a case. However, petitioners suspect that, contrary to their argument, the real parties in interest are also aware that such rules have never heretofore been interpreted to necessitate the compiling and/or filing of class lists for purposes of evaluating recusals.

The real parties in interest also mistakenly assert that there is a "clear mandate of Congress" that stock ownership in class members requires recusal. (Opposition Brief at 10.) However, as noted by both Judge Muecke and the Ninth Circuit, there is no congressional mandate on the issue whether class members should be treated as parties for recusal purposes. In fact, there is no indication that the question ever occurred to the drafters of Section 455. See, *In re Cement and Concrete Antitrust Litigation, supra,* 515 F. Supp. at 1079, and *In re Cement Antitrust Litigation,* 688 F.2d 1297, 1309 and 1314 (9th Cir. 1982), Appendix A to petition at A-19 and A-28.

The "mandate" advanced by the real parties in interest is actually the legislative history regarding disqualification for interests in "parties." But, this argument begs the question since the issue here is whether the congressional statements about "parties" were intended to apply to class members. Both Judge Muecke and the Ninth Circuit recognized that there is no clear answer in the legislative history of Section 455 to the question whether class members should be treated as parties.[4]

[4] The fact that the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States concluded that Judge Muecke's recusal was appropriate is unrelated to his holding that class members are parties for purposes of 28 U.S.C. § 455(b)(4), and in no way evidences the absence of a conflict on this issue. Judge Muecke specifically recognized that "[t]he Committee did not consider the first issue raised by defendants, whether my wife's stock ownership in a class member constituted a 'financial interest in a *party* to the proceeding.'" *In re Cement and Concrete Antitrust Litigation, supra,* 515 F. Supp. at 1079. He also observed that the basis for the Committee's opinion (1) "was not specific" and (2) "suggested the applicability" of both the "subject matter" and "other" interest clauses of Section 455(b)(4) and of Canon 3C. (*Id.*) Judge Muecke specifically declined to rule on the "subject matter" provision of § 455, 515 F. Supp. at 1080, and the Ninth Circuit did not discuss the Advisory Committee's opinion at all.

Moreover, the law which has developed under Rule 23, Federal Rules of Civil Procedure, provides no definitive resolution. *See, In re Cement Antitrust Litigation, supra,* 688 F.2d at 1309-10, Appendix A at A-20-21.

The real parties in interest specifically assert (at page 11) that Congress mandated *per se* recusal for all stock interests, arguing:

> Treating stock ownership in a class member as an "other interest" (which as noted requires recusal only if "substantially" affected) would reintroduce the need for a "substantiality" determination, thereby injecting the very ambiguity which Congress expressly attempted to eliminate as to stock ownership in amending Section 455.

Yet, nothing in Section 455 constitutes a *per se* recusal rule applicable to all stockholdings.[5] In fact, stock interests, in particular, are not discussed in the statute. Neither the language or purpose of Section 455 prevents a stockholding from constituting an "other interest."[6] The legislative history does not indicate that, as a general proposition, Congress intended to eliminate the substantiality determination "as to stock ownership in amending Section 455." Rather, Congress was concerned with the nexus between the interest and the litigation, not the form of the interest.[7]

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[5] Conversely, Congress did not exempt interests other than stockholdings from the *per se* disqualification statute. Footnote 3 of the Opposition Brief observes that petitioners included a non-equity interest in a class member in their list of this Court's potentially disqualifying interests, *i.e.* Justice Powell's Caterpillar Tractor debenture. It should be noted that this debenture is convertible to stock and that the interests in a party for which Section 455 mandates recusal are not limited to equity interests. In addition, even if this Court were to limit recusal to equity interests, Justice Powell's 1982 disclosure statement shows stockholdings in two other entities on the Master Class List—Ethyl Corp. and Proctor & Gamble.

[6] For example, the substantiality test for "other" interests would apply to the recusal of a judge from a case where the issue to be decided is the extent that companies like one in which the judge owns stock must comply with onerous or expensive statutory regulations.

[7] Similarly, the Opposition Brief discusses Congress's intent to establish a *per se* recusal rule for "financial interests," as though this applies to all monetary interests and solely to monetary interests. "Financial interest" as used in Section 455(b)(4) is a term of art defining all direct interests (including, for example, a directorship) in a party or in the subject matter of the litigation. 28 U.S.C. § 455(d)(4). *See,* Judicial Disqualification: Hearings on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. (1971, 1973) at 97.

Finally, the real parties in interest argue that there is no conflict because this Court has already ruled that class members are parties under Section 455(b)(4) in *United States* v. *Will*, 499 U.S. 200 (1980), citing footnote 11. This assertion was made to both the district court and the Ninth Circuit, neither of whom even mentioned *Will* in their decisions. Petitioners submit that this Court invoked the Rule of Necessity in *Will* because all Article III judges had interests in the subject matter of the litigation, and not because certain judges were class members. *See United States v. Will, supra* at 478.

Indeed, if the *Will* opinion had resolved this issue as suggested by the real parties in interest, there would presumably have been some reflection of this in the practice under Supreme Court Rules 21 and 28.1, which have continued to be interpreted as requiring only the listing of named parties and their parents, subsidiaries and affiliates. As noted in the petition, this Court may not have been able to grant certiorari in the *Plywood Litigation*[8] if *Will* had required that it consider interests in class members. However, the petitioners in *Plywood* did not submit a class list until after the Ninth Circuit's ruling here, presumably because neither they nor the Clerk of this Court believed them to be under any conceivable obligation to do so.[9]

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[8] *Weyerhaeuser Co. v. Lyman Lamb Co.*, No. 81-1618, and *Georgia Pacific Corp. v. Lyman Lamb Co.*, No. 81-1619.

[9] The real parties in interest claim that no recusal issue is raised by the interests of any Justice in a *Plywood* class member because "only four individual plaintiffs (not the class) are before the Court." (Opposition Brief at fn. 14.) As is apparent from the Fifth Circuit's opinion, the issues before this Court directly affect the interests of *Plywood* class members. The Fifth Circuit affirmed the district court's denial of defendants' motion for judgment notwithstanding the verdict and for a new trial at the conclusion of a jury trial (certified to proceed on behalf of the classes) which determined "all issues except the amount of damages sustained by individual plaintiffs, intervenors, and class members. . . ." *In re Plywood Antitrust Litigation*, 655 F.2d 627, 631 (5th Cir. 1981). Thereafter, on the basis of the jury's determination of defendants' liability and a class-wide measure of damages, "four members of the plaintiff classes, [including] the Lyman Lamb Company . . . moved for summary judgment as to individual damages computed in accordance with the jury's verdict." (*Id.* at 632.) Since the appeal was taken from the Rule 54(b) judgments entered in favor of certain class members as individuals, the real parties in interest here claim that the class is not before this Court. In fact, among the issues upon which certiorari was granted is the measure of damages which is to be applied on a class-wide basis.

III.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition, this petition for a writ of certiorari should be granted.

DATED: December 6, 1982.

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